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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-sixth session

SUMMARY RECORD OF THE 496th MEETING

Held at the Vienna International Centre, Vienna,
on Tuesday, 6 July 1993, at 9.30 a.m.

Chairman: Mr. MOHAMMED (Nigeria)

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The meeting was called to order at 9.40 a.m.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (continued) (A/CN.9/371, A/CN.9/375, A/CN.9/376 and Add.1, A/CN.9/377)

Consideration of draft Model Law on Procurement (continued)

Article 6 (continued)

1. The CHAIRMAN said that, in the absence of any comments, he took it that the Commission wished to adopt paragraphs (3), (4) and (5) as they appeared in the annex to document A/CN.9/371.

2. It was so decided.

3. Mr. KLEIN (Observer for the Inter-American Development Bank), noting that he wished to comment on paragraphs (6) and (7) together, said that paragraph (6) as it stood permitted disqualification for minor errors and precluded the possibility of correcting such errors. With regard to paragraph (7), he believed that the phrase "Except where prequalification proceedings have taken place" should be deleted.

4. He suggested that in paragraph (6) the words "or inaccurate" be deleted and that a sentence reading as follows be added: "Solicitation documents shall permit suppliers or contractors to promptly correct reparable errors or omissions, usually relating to information of a factual or historical nature, required under paragraph (2)." The first part of paragraph (6) would then deal with instances of bad faith, while the second part would permit the correction of mistakes.

5. Mr. TUVAYANOND (Thailand), expressing support for what the Secretariat had proposed in document A/CN.9/377 regarding paragraph (6), suggested that the word "substantially" be inserted before "inaccurate" in that paragraph.

6. Ms. ZIMMERMAN (Canada) proposed that the end of paragraph (6) be amended to read "false, inaccurate or incomplete". Alternatively, if the intention of paragraph (7) was to address situations where the supplier or contractor had not submitted any information at all, she would propose that the end of paragraph (6) be amended to read "was false, inaccurate or, subject to paragraph (7), incomplete".

7. With regard to the suggested insertion of the word "substantially" in paragraph (6), she felt it might cause more problems than it solved.

8. Mr. GRIFFITH (Observer for Australia) felt that the proposed addition of the words "or incomplete" in paragraph (6) was probably unnecessary as incomplete compliance with the requirements of paragraph (2) would automatically mean failure to qualify. However, he would have no objection to the addition if the word "inaccurate" was qualified on the lines suggested by the representative of Thailand, but using the word "materially" rather than "substantially". If "materially" was understood in the same way in both the civil law and the common law setting, the addition of that word would help to ensure that disqualification on unreasonable grounds did not take place.

(Mr. Griffith, Observer for Australia)

9. With regard to the point raised by the observer for the Inter-American Development Bank about the impossibility of correcting minor errors under the terms of paragraph (6), he warned against making it possible to correct intentional errors and thereby encouraging fraud. The possibility of correcting intentionally false, inaccurate or incomplete information should be excluded.

10. Mr. JAMES (United Kingdom) agreed with the observer for Australia that the word "materially" would be better than "substantially".

11. Mr. WALLACE (United States of America), agreeing to the inclusion of the words "or incomplete" and "materially" for the reasons already given, pointed out that the word "materially" was used in subparagraph (2) (b) of article 29.

12. With regard to the warning of the observer for Australia about making it possible to correct intentional errors, he wondered how the procuring entity was to judge the motivation of a supplier or contractor committing an error.

13. Mr. TUVAYANOND (Thailand) suggested inserting the word "materially" in front of "false" and adding "incomplete", so that the phrase read "was materially false, incomplete or inaccurate".

14. Mr. KLEIN (Observer for the Inter-American Development Bank) said that the supplier or contractor should be given the opportunity to submit the information which had inadvertently not already been submitted.

15. Ms. ZIMMERMAN (Canada) said she supported the inclusion of the word "materially" in paragraph (6).

16. With regard to paragraph (7), it was her recollection that the previous draft had referred to "the submission of tenders, proposals or offers". Had the words "proposals or offers" been deleted inadvertently?

17. The CHAIRMAN confirmed that they had and said that the typographical error would be corrected by the Secretariat.

18. Mr. KOMAROV (Russian Federation) supported the inclusion of either "substantially" or "materially" in paragraph (6), there being no significant difference in the Russian language between the two. The inclusion of "incomplete", as proposed by the Canadian delegation, would also be useful.

19. He agreed that the possibility of correcting wrong information should not mean that intentionally false, inaccurate or incomplete information could be corrected. In the case of an intentional error, procuring entities could not but disqualify; they should not have the discretion to do otherwise.

20. Mr. LEVY (Canada), referring to the suggestion made by the representative of Thailand, said he had difficulty in understanding how "materially" could qualify "false", which was an absolute concept. In his view, the concept "false" implied intention, whereas "inaccuracy" implied a mistake. He would prefer the formulation "false or materially inaccurate or incomplete".

21. Mr. PEREZNIETO CASTRO (Mexico) agreed with the representative of Canada that "false" could not be qualified.

22. Mr. GRIFFITH (Observer for Australia) said that, in his understanding, "false" submissions were incorrect submissions made unintentionally. Since he and the representative of Canada - both from common law countries - apparently differed as to the meaning of "false", a reference to intention should perhaps be included.

23. Mr. GRUSSMANN (Austria), drawing attention to the words "at any time" in paragraph (6), said he favoured amending the end of paragraph (6) to read "was false, inaccurate or, subject to paragraph (7), incomplete". False or inaccurate information should at any time be grounds for disqualification, but not incomplete information.

24. Mr. TUVAYANOND (Thailand) said that, if intentionality was implicit in the word "false", perhaps the end of paragraph (6) should read "was false or materially inaccurate or incomplete".

25. Mr. JAMES (United Kingdom) said that a consensus seemed to exist in the Commission and that the matter should now be left to the drafting group which the Commission would no doubt be setting up. The essential point was to distinguish between information which was wrong (whether intentionally or otherwise) and information which was incomplete.

26. He endorsed the remarks just made by the representative of Austria.

27. Mr. SOLIMAN (Egypt) proposed that reference be made in paragraph (7) to previous misconduct, enabling the procuring entity to disqualify a supplier or contractor because of a major breach of contractual obligations in the past.

28. Ms. ZIMMERMAN (Canada) said that, in the light of the discussion, she felt that the end of paragraph (6) should read "was false, materially inaccurate or, subject to paragraph (7), materially incomplete".

29. With regard to the proposal made by the representative of Egypt, perhaps his concern was met by the references in subparagraph (2) (a) to "reliability" and "reputation".

30. Mr. BONELL (Italy) endorsed the remarks just made by the representative of Canada and the remarks made earlier by the representative of Austria.

31. Mr. TUVAYANOND (Thailand) said that, if paragraph (6) was to be amended so that it contained a reference to paragraph (7), the words "for the reason that it has not provided proof that it is qualified pursuant to paragraph (2) of this article" would need to be deleted from paragraph (7), while the words "undertakes to provide such proof" would have to be amended to read "undertakes to rectify the inaccuracy or incompleteness referred to in paragraph (6)".

32. The CHAIRMAN proposed that the final wording of paragraph (7) be left to the drafting group.

33. Mr. TUVAYANOND (Thailand) pointed out that paragraph (7) currently referred to "proof" of the supplier's or contractor's qualifications, which was a separate issue from the inaccuracy or incompleteness of information provided by the supplier or contractor. A supplier or contractor undertaking to rectify the inaccuracy or incompleteness referred to in paragraph (6) should not be excluded from the procurement process.

34. Mr. BONELL (Italy) said he favoured a wording of paragraph (7) along the lines suggested by the representative of Thailand.

35. Mr. AL-NASSER (Saudi Arabia) considered that paragraphs (2) and (6) covered all contingencies and that paragraph (7) should therefore be deleted.

36. Mr. JAMES (United Kingdom) reiterated his view that the matter of wording should now be left to the drafting group.

37. With regard to the remark just made by the representative of Saudi Arabia, he believed that paragraph (7) was important and should be retained.

38. Mr. PHUA (Singapore), agreeing on the need to retain paragraph (7), said that the paragraph dealt with the provision of proof that the requirements of paragraph (2) had been satisfied, whereas the current discussion on the paragraph dealt with a quite different issue - the rectification of the inaccuracy or incompleteness of information. If paragraph (7) was to be amended - a task that, in his view, could be dealt with by the envisaged drafting group - the two issues should be clearly distinguished.

39. Mr. GRIFFITH (Observer for Australia), agreeing that two separate issues were involved, said it might be desirable to break paragraph (7) into two parts. Meanwhile, the drafting group should perhaps be given some guidance on whether, in cases of inadvertence, rectification of the inaccuracy or incompleteness of information was or was not to be permitted.

40. Mr. KOMAROV (Russian Federation) said it was important to provide for such rectification if the inaccuracy or incompleteness was unintentional.

41. Mr. WALLACE (United States of America) said that the point now under discussion had arisen as a result of the addition of the word "incomplete" to paragraph (6). Originally, paragraph (6) had dealt only with questions of falsehood or inaccuracy, and paragraph (7) only with questions of incompleteness. The two sets of questions would have to be disentangled before paragraph (7) could be dealt with by the drafting group.

42. Mr. KLEIN (Inter-American Development Bank) said that his aim in initiating the present discussion had been to ensure that, in situations where prequalification existed, there would be a short period during which the supplier or contractor could correct involuntary errors or omissions, thereby avoiding automatic disqualification. He was not sure whether he had succeeded in achieving that aim.

43. The CHAIRMAN said that in his view the issue was a drafting matter.

44. Mr. TUVAYANOND (Thailand) said that, if it was clear that both questions of falsehood and questions of inaccuracy and incompleteness were now to be dealt with in paragraph (7), he could agree that the matter be referred to the drafting group.

45. Mr. WALLACE (United States of America) said it was important to be clear about the aim of paragraph (7), which appeared to have been inadvertently changed. Originally, the aim had been to allow a supplier or contractor submitting incomplete information to "complete the record"; the aim had not been to allow a supplier or contractor submitting false or inaccurate information to "put the record straight". Acceptance of such a change in the aim of paragraph (7) would amount to a policy decision on the part of the Commission.

46. Mr. PARRA PEREZ (Observer for Venezuela) said that in considering paragraphs (6) and (7) one was dealing with two elements of the responsibility of a potential supplier or contractor - a subjective one and an objective one. The subject element was that of possible guilt on the part of the supplier or contractor submitting false, inaccurate or incomplete information; the objective element was the relevance or importance of the error, inaccuracy or omission. In many administrations, when the authorities noted an error, inaccuracy or omission, they notified the party involved in order that it might put the matter right. Paragraph (7) served that purpose, and it was not concerned with questions of possible guilt.

47. Mr. BONELL (Italy) said he assumed that, with the replacement of "was false or inaccurate" by "was false or materially inaccurate or incomplete", paragraph (6) was acceptable to the Commission. If that assumption was correct, he agreed that the possible reworking of paragraph (7) was simply a drafting matter. If that assumption was wrong, however, the possible reworking of paragraph (7) might involve points of substance.

48. While not wishing to reopen the discussion on paragraph (6), if it was indeed closed, he would like to say that, in his view, while false statements could obviously not be "corrected", there was no difference between correcting incomplete statements and correcting inaccurate statements.

49. Mr. AZZIMAN (Morocco) said that, in his view, the purpose of paragraph (6) was to "penalize" suppliers or contractors submitting false or materially inaccurate or incomplete information, while the original purpose of paragraph (7) was to enable suppliers or contractors to demonstrate that they were qualified to submit tenders. Some speakers, however, apparently wanted paragraph (7) also to serve the purpose of enabling suppliers or contractors to correct inaccuracies in the information submitted by them. As that might lead to contradiction between paragraphs (6) and (7), the Commission should ensure that paragraph (7) served only its original purpose.

50. Mr. AL-NASSER (Saudi Arabia), recalling his earlier remark to the effect that paragraph (7) could be deleted, suggested that in paragraph (6) the words "was false or inaccurate" be replaced by "does not meet all necessary conditions". If that change were made, paragraph (2), which spoke of the right of the procuring entity to require the provision of "such appropriate documentary evidence or other information as it may deem useful", and paragraph (6) would together suffice.

51. Mr. TUVAYANOND (Thailand), stressing the need to provide the drafting group with guidance, said he had no intention of reopening the discussion on paragraph (6).

52. As he saw it, there were at present two issues before the Commission: first, that of precluding abuse of power on the part of the procuring entity, which should not be able to allege that information was false without giving the supplier or contractor an opportunity to rebut the allegation; and secondly, that of enabling the supplier or contractor to rectify the unintentional incompleteness and inaccuracy of information. The issue of precluding abuse of power on the part of the procuring entity would appear to have been resolved by the replacement of "was false or inaccurate" by "was false or materially inaccurate or incomplete" in paragraph (6).

53. Mr. GRUSSMANN (Austria), agreeing with the United States representative's most recent comment, said that the problem now before the Commission might have been caused by the insertion of the word "materially" before both "inaccurate" and "incomplete" in paragraph (6). There should be no possibility of rectifying a material inaccuracy, only of rectifying a formal inaccuracy such as incompleteness. If that point were clear, the rest could perhaps be left to the drafting group.

54. Mr. WALLACE (United States of America) associated himself with the Austrian representative's remarks. With regard to the remarks made by the representative of Saudi Arabia, he felt that paragraph (7) could be a part of paragraph (2).

55. With regard to the issue of precluding abuse of power on the part of the procuring entity, to which the representative of Thailand had referred, he recalled that suppliers or contractors convinced that they had been wrongly excluded had the possibility of recourse under chapter V - Review.

56. If the procurement entity was irresponsible and the procurement process therefore conducted in a poor manner, potential suppliers or contractors would simply stop responding to invitations to tender in the country in question.

57. Mr. KLEIN (Observer for the Inter-American Development Bank) said that all appeared to agree that there could be no correction of errors or omissions when there was bad faith. What he had wished to propose, however, was that, when small errors or omissions had been made without bad faith, suppliers or contractors should be able to correct them even when prequalification proceedings had taken place.

58. Mr. TUVAYANOND (Thailand), responding to the representative of the United States, said that recourse under chapter V against exclusion was a post facto process, whereas paragraph (7) was concerned with the possibility of avoiding exclusion in the first place.

59. He did not think that paragraph (7) could be a part of paragraph (2). In his opinion, paragraph (7) was in its right place - after paragraph (6). The Commission should not try to redraft paragraph (7), but guidelines should be given to the drafting group on how to enable suppliers or contractors to rebut allegations of falsehood and how to enable them to rectify minor errors and shortcomings.

60. Mr. BONELL (Italy), supported by Mr. PEREZNIETO CASTRO (Mexico), said he had the impression that the discussion on paragraph (6), which he had assumed to be closed, was being reopened.

61. The CHAIRMAN said that that was his impression also.

62. Mr. WALLACE (United States of America) said that, if - as he believed was the case - the Commission wished paragraph (6) to end with the words "was false or materially inaccurate or incomplete", it should be clearly understood that "materially" qualified both "inaccurate" and "incomplete".

63. He proposed that paragraph (7) be incorporated into paragraph (2).

64. Mr. GRIFFITH (Observer for Australia) said he believed it to be the Commission's view that, if information was intentionally false or materially inaccurate or incomplete, no opportunity ought to be given to the supplier or contractor to correct it, but that, if information was neither materially false nor materially inaccurate, such an opportunity ought to be provided. If that was the case, he would suggest that the drafting group be asked to draw up an appropriate text on that basis.

65. Mr. TUVAYANOND (Thailand) proposed the following text for inclusion in paragraph (7):

> "The supplier or contractor shall be allowed to provide proof in rebuttal of an allegation of falsehood and to rectify the inaccuracy or incompleteness referred to in paragraph (6) no later than the deadline for the submission of tenders, unless there are reasonable grounds for believing that the supplier or contractor will not be able to do so".

66. Mr. BONELL (Italy) said that, in his opinion, issues like the one addressed in the proposal made by the representative of Thailand should be dealt with elsewhere in the Model Law or through the courts.

67. With regard to the intervention by the observer for Australia, he did not think there was agreement that rectification should not be allowed if information was materially incomplete or inaccurate.

68. Mr. JAMES (United Kingdom), noting that his recollection was the same as that of the Italian representative, said that paragraph (7) in the form adopted by the Working Group contained a generous concession to suppliers and contractors, in that it allowed them to provide information at any time up to the deadline for the submission of tenders.

69. His understanding was that the Commission had agreed to add "incomplete" in paragraph (6) and to make that paragraph subject to paragraph (7), and that it had then agreed that the correction of unintentionally inaccurate information should also be provided for under paragraph (7). That would be consistent with the view taken by the Working Group in the matter of incomplete applications, and he was in favour of such a provision as it would potentially benefit suppliers and contractors without doing any harm to the procuring entity. Paragraph (7) should thus apply to inaccuracies and incompleteness of any kind, whether material or not.

(Mr. James, United Kingdom)

70. With regard to the proposal made by the representative of Thailand, he suggested that the Commission take it up when it came to chapter V.

71. Mr. TUVAYANOND (Thailand) said he could accept that suggestion.

72. With regard to paragraph (6), he felt that it should be possible for suppliers or contractors to challenge disqualification only if they had been disqualified on the grounds of minor inaccuracies or incompleteness; they should be sufficiently competent not to make substantial errors in the information which they provided, and the present text was generous enough in allowing minor errors to be rectified.

73. Mr. KLEIN (Observer for the Inter-American Development Bank) said that, while there appeared to be agreement that suppliers or contractors should be able to correct minor errors up to the deadline for the submission of tenders, he had the impression that the Commission still believed that they should not be able to do so if prequalification proceedings had already taken place. He believed that the fact that such proceedings had already taken place should not debar suppliers or contractors from correcting minor errors up to the tender submission deadline.

74. Mr. PEREZNIETO CASTRO (Mexico) said that he was inclined to favour the position taken by the representatives of Italy and the United Kingdom regarding the proposal made by the representative of Thailand: chapter V already made provision for suppliers or contractors to challenge the allegation that information which they had submitted was false.

75. Mr. WALLACE (United States of America), noting that he also was inclined to favour that position, went on to say that two drafting problems remained: they related to the phrase "at any time" in paragraph (6) and to the fact that the words "false or inaccurate" occurred also in paragraph (8) of article 7.

76. The CHAIRMAN invited members to reflect during the lunch break on the issues raised in the course of the meeting so that a decision could be taken in the afternoon meeting.

The meeting rose at 12.35 p.m.